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In the Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

1. Whether an agency acts arbitrarily and capriciously in rescinding a rule that has not yet taken effect, when changed circumstances leave substantial uncertainty that the rule will produce the benefits on which its initial promulgation was premised, and such uncertainty would have permitted the agency to decline to issue the rule in the first instance.

2. Whether the National Highway Traffic Safety Administration (NHTSA) acted arbitrarily and capriciously in rescinding the particular requirement in Motor Vehicle Safety Standard 208 that new vehicles produced after September 1982 be equipped with passive restraints for occupants, based on NHTSA's inability to find that the requirement would satisfy the statutory criteria for a motor vehicle safety standard, without first considering whether other versions of a passive restraint standard would be appropriate.

3. Whether, even if the passive restraint requirement of Standard 208 was not validly rescinded, the court of appeals exceeded the proper limits on judicial review by ordering that requirement into effect on September 1, 1983, without first affording NHTSA an opportunity to conduct further proceedings on remand or to exercise the authority conferred on the Secretary by 15 U.S.C. 1392(c) and (e) to establish a new effective date for the Standard.

LIST OF PARTIES BELOW

State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, Leorlin Boyd, National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung were petitioners in the proceedings below. The Department of Transportation, Secretary of Transportation Drew Lewis, the National Highway Traffic Safety Administration, and NHTSA Administrator Raymond A. Peck, Jr. were respondents below. Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., Automobile Importers of America, Inc., Consumer Alert, Pacific Legal Foundation, and Albert B. Lewis, Superintendent of Insurance for the State of New York, were intervenors below.

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BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The June 1, 1982 opinion of the court of appeals (Pet. App. 1a-76a)[1] is reported at 680 F.2d 206. The August 4, 1982 supplemental order and memorandum of the court of appeals (Pet. App. 79a-82a) are not reported.

JURISDICTION

The jurisdiction of the court of appeals rested on 15 U.S.C. 1394(a)(1). The judgment of the court of appeals (Pet. App. 160a-161a) was entered on June 1, 1982, and the supplemental order of the court of appeals (Pet. App. 79a-80a) was entered on August 4, 1982. The petitions for a writ of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. On August 24, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 82-398 to and including September 8, 1982, and the petition was filed on that date. The petitions for a writ of certiorari were granted on November 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 1394(a)(4).

STATUTORY PROVISIONS INVOLVED

Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392, and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, are set forth in pertinent part in the Appendix, *infra*, 1a-2a.

STATEMENT

1. In 1966 Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. (& Supp. V) 1381 *et seq.* (hereinafter "Safety Act"), for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. To accomplish this goal, the Act directs the Secretary of

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 82-354.

Transportation[2] to issue appropriate federal motor vehicle safety standards (15 U.S.C. 1392(a)) and prohibits the manufacture, sale, or delivery into commerce of any motor vehicle that is not in conformity with such standards. 15 U.S.C. 1397.

The Act provides that each motor vehicle safety standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a). In addition, the Secretary must consider whether any proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle and "the extent to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392(f) (3) and (4). The Act also grants the Secretary authority to "amend or revoke any Federal motor vehicle safety standard" (15 U.S.C. 1392(e); see also 15 U.S.C. 1407).

2. a. In 1967, the Secretary promulgated Federal Motor Vehicle Safety Standard 208, which required the installation of seat belts in all cars. 32 Fed. Reg. 2408, 2415. In 1969, the Department of Transportation announced that it was considering the initiation of rulemaking proceedings to require installation of inflatable airbags or other "passive occupant restraint systems"—devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle. 34 Fed. Reg. 11148. The Department formally proposed such a standard in 1970. 35 Fed. Reg. 7187.

Between 1970 and 1972, after lengthy administrative proceedings, the Secretary issued a series of orders culminating in an amendment to Standard 208 requiring full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975. The Standard permitted optional means of compliance for vehicles built between August 1973 and August 15, 1975. Such vehicles

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[2] The Secretary's general authority under the Safety Act has been delegated to the Administrator of the National Highway Traffic Safety Administration (hereinafter "NHTSA"). 49 C.F.R. 1.50(a).

could have (i) full passive protection; (ii) partial passive protection, with lap belts for front seat occupants; or (iii) manual lap and shoulder belts coupled with an ignition interlock to prevent the car from starting unless the occupants' belts were fastened. See 35 Fed. Reg. 16927 (1970); 36 Fed. Reg. 4600 (1971); *id.* at 19254; *id.* at 19266; 37 Fed. Reg. 3911 (1972); Pet. App. 6a-8a.[3]

On petitions for review, the United States Court of Appeals for the Sixth Circuit upheld the agency's decision to require passive restraints as a "proper exercise of its administrative discretion." *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 674 (6th Cir. 1972).[4] The court concluded, however, that the testing procedures required for passive restraints did not satisfy the Act's requirement that a standard be "objective."

The Sixth Circuit's decision did not invalidate the manual belt and interlock option.[5] However, public irritation

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[3] Full passive protection required the meeting of performance criteria for frontal, side, and rollover crashes without instrument-measured injury to a test dummy, while partial passive protection required the meeting of the same performance criteria for frontal crashes only. 37 Fed. Reg. 3911 (1972).

[4] The Sixth Circuit stressed that if it appeared as the time for implementation approached that further testing or development was necessary, the agency was free to consider "whether to extend the time for implementation or to alter, or even to abandon, the project." 472 F.2d at 673.

[5] The interlock option was added after adoption of the version of the Standard that was under review in *Chrysler*. However, in a subsequent decision, the Sixth Circuit held the crash test and injury criteria invalid for the manual belt and interlock option as well. *Ford Motor Co.* v. *National Highway Traffic Safety Administration*, 473 F.2d 1241 (1973). As contemplated by the *Ford Motor* decision (473 F.2d at 1244), NHTSA then deleted the crash test and injury criteria from the manual belt and interlock option, thereby effectively requiring installation of manual belts and ignition interlocks beginning on August 15, 1973. 38 Fed. Reg. 16072 (1973).

In August 1973, the agency corrected the test dummy specifications "for the limited purpose of evaluating vehicles with passive restraint systems manufactured under the first and second re-

with interlock systems led Congress in 1974 to amend the Safety Act to prohibit any motor vehicle safety standard from requiring or permitting compliance by means of an ignition interlock or a continuous buzzer designed to indicate that safety belts are not in use. 15 U.S.C. 1410b(b)(1); see Pet. App. 8a; 120 Cong. Rec. 27815-27823, 35036 (1974). The 1974 statutory amendment also provided that any safety standard requiring compliance by means of an occupant restraint system other than a belt system, such as inflatable airbags, would be subject to a two-House legislative veto. 15 U.S.C. 1410b(b)-(d).

NHTSA had concluded the previous April that to permit emergency egress after an accident, passive belts—belts that move into place automatically when the occupant closes the door—should have a release mechanism in the form of a conventional latch, accompanied by an ignition interlock and warning buzzer to encourage reattachment. 39 Fed. Reg. 14593 (1974). In view of the 1974 statutory amendment, however, NHTSA eliminated the ignition interlock and buzzer aspect of the emergency detachment requirement. Pet. App. 9a-10a; 39 Fed. Reg. 38380 (1974). In addition, in response to the *Chrysler* decision and the 1974 legislation, NHTSA extended the optional alternatives for compliance with Standard 208 until August 31, 1976. 40 Fed. Reg. 16217, 33977 (1975).

b. On June 9, 1976, Secretary Coleman initiated a new rulemaking proceeding on the passive restraint issue. 41 Fed. Reg. 24070 (1976). After hearing testimony and reviewing written comments, Secretary Coleman extended the optional alternatives indefinitely, because of his expectation that there would be widespread public resist-

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straint options between August 15, 1973 and August 15, 1975." 38 Fed. Reg. 20449. The notice stated that the question of restraint requirements after August 15, 1975 was still open and would be addressed in future rulemaking (*ibid.*). Only a very limited number of vehicles were expected to be fitted with full or partial passive protection during this interim period (*ibid.*).

ance to mandatory passive restraints. 42 Fed. Reg. 5071 (1977); C.A. App. 2002.[6] He instead proposed a demonstration project involving up to 500,000 cars installed with passive restraints, in order to smooth the way for public acceptance of any mandatory passive restraint standard at a later date. Pet. App. 10a; C.A. App. 2061, 2073-2074.

c. In July 1977, Secretary Adams decided to dispense with the demonstration project developed by Secretary Coleman and instead adopted Modified Standard 208, at issue here. The Modified Standard mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars by model year 1984. The two principal systems that would satisfy the Standard were airbags and passive belts,[7] leaving to the manufacturers the choice of which system to install. 42 Fed. Reg. 34296 (1977).[8] On petitions for review, the

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[6] "C.A. App." refers to the Joint Appendix in the court of appeals, which contains the pertinent materials from the voluminous administrative record, as designated by the parties. The parties have lodged with the Clerk of this Court 15 copies of the Joint Appendix in the court of appeals.

[7] Two manufacturers have offered automatic belt systems as options on their vehicles for some time. In model years 1975-1981, Volkswagen sold more than 300,000 Rabbits equipped with detachable automatic belts having an ignition interlock and a continuous buzzer to discourage detachment. Pet. App. 18a n.12. (Installation of these use-compelling features was permissible under 15 U.S.C. 1410b(b)(1) because the devices were not installed as a means of compliance with Standard 208). Between 1978 and 1980, General Motors sold approximately 20,000 Chevettes with automatic belts. For the 1978 and 1979 model years, the belts were coupled with interlock devices similar to those in the Volkswagen Rabbits; for the 1980 model year, the vehicles had a nondetachable continuous belt system, which permitted the belt to "play out" from a spool to permit emergency egress. Only 13,000 of 415,000 Chevettes purchased in model year 1980 were equipped with these belts, even though the option was made available at no charge to purchasers and dealers received bonuses for selling them (C.A. App. 403).

[8] At the time of Secretary Adams' decision, the passive seat belt option continued to include the requirement that the belt be detachable to permit emergency release. In November 1978, however,

United States Court of Appeals for the District of Columbia Circuit sustained the validity of Modified Standard 208. The court of appeals found Secretary Adams' decision that airbags would be effective "rational," recognized that public resistance to passive restraints was a factor that had to be considered and presented a "matter of judgment" for the Secretary, and held that the Secretary had not "abused his discretion" in assessing the tradeoffs between the expected benefits and potential dangers of airbags. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1344, 1346-1347 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

d. In February 1981, Secretary Lewis proposed a one-year postponement of the effective date of Modified Standard 208 to permit further study in light of changed circumstances since it was promulgated in 1977. 46 Fed. Reg. 12033; C.A. App. 1622. Two months later, NHTSA issued a final rule ordering a one-year delay, until September 1982, in the application of the Modified Standard to large cars. 46 Fed. Reg. 21172; C.A. App. 1272. In a notice published the same day, the Secretary proposed and requested comment on four possible revisions of the Standard: (1) reversal of the phase-in sequence to require compliance by small cars first; (2) simultaneous compliance by all cars; (3) rescission of the passive restraint requirement; and (4) deletion of a requirement for passive restraints in the front center seating position. 46 Fed. Reg. 21205; Pet. App. 147a-159a; C.A. App. 12-15.

After receiving written comments and holding public hearings, NHTSA issued a final rule on October 23, 1981 amending Modified Standard 208 to delete the requirement that passive restraints be installed, while permitting their installation as an optional means of compliance (see

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NHTSA amended the Standard to afford manufacturers for the first time the option of making automatic belts either detachable or nondetachable. 43 Fed. Reg. 52493; C.A. App. 1705. As explained in footnote 7, *supra*, General Motors made the nondetachable, or "continuous," belt option available in the 1980 model year Chevettes, with only limited success.

note 29, *infra*). NHTSA explained that it had a duty under the Act "to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard must satisfy" (Pet. App. 93a).[9] On the basis of its thorough review, NHTSA determined that it was "incapable of finding now, as it was able to do in 1977, that the automatic restraint requirements would meet all of the applicable criteria in the Vehicle Safety Act" (*ibid.*):

i. NHTSA noted that its determination in 1977 that the Standard would produce significant safety benefits depended on several "critical assumptions" (Pet. App. 94a-95a), the validity of which had been "substantially if not wholly undermined by drastic changes in the types of automatic restraints that would have been installed under the automatic restraint requirements" (*id.* at 96a). First, although the agency had assumed in 1977 that airbags would be installed in 60% of all new cars and automatic seat belts in 40%, it concluded that because of the change to small cars, manufacturers planned to install automatic seat belts in approximately 99% of the new cars. "Thus, the assumed life-saving potential of air bags would not have been realized" (*ibid.*).

Second, the agency determined that the automatic belts installed in the "overwhelming majority of new cars" would have been detachable. This design choice stemmed in part from the manufacturers' desire not to impede emergency exit and in part from their concern that a significant number of people would resist belts not having this feature because of a fear of being trapped (Pet. App. 97a, 99a, 11a; see C.A. App. 305, 363, 431, 435, 595, 653, 1220, 2549). NHTSA concluded that detachable belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently" and that their use "thereafter requires the

[9] NHTSA also stated that the review was undertaken to ensure that the Standard met the requirements of cost-effectiveness provided by Exec. Order No. 12991, 46 Fed. Reg. 13193 (1981).

same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts" (Pet. App. 97a-98a; see C.A. App. 406, 431, 806, 1253).

Third, NHTSA found that although surveys of the use of automatic belts in Volkswagen Rabbits and Chevrolet Chevettes (see note 7, *supra*), conducted since Modified Standard 208 was promulgated in 1977, indicated usage rates as high as 70% or 80%, these studies suffered from a number of limitations that rendered them unreliable as bases for predicting the usage of the detachable belts that would be installed to comply with Modified Standard 208 if it went into effect: (1) the belts surveyed either had an ignition interlock or were continuous nondetachable belts and thus were dissimilar to detachable belts; (2) the cars that were the subjects of the studies were not typical of the Nation's automobile fleet generally, because a combination of owner demographics and driver risk perception ordinarily results in higher usage rates in smaller cars; (3) most purchasers of the cars surveyed voluntarily invested in the passive restraints; and (4) crash data for Rabbits revealed a significantly lower actual usage rate than that indicated by the surveys (Pet. App. 97a-104a; see C.A. App. 405-406, 555, 1220).

Recognizing that extrapolation from these "extremely sparse factual data * * * necessarily involve[s] exercises of discretion and informed judgment" (Pet. App. 103a), the agency concluded that the manufacturers' plans to satisfy Modified Standard 208 by installing detachable belts that so closely resembled the manual belts then in use had left it without a basis for reliably predicting the likelihood that the Standard would lead to any significant increased usage of restraints at all (*id.* at 99a, 104a). NHTSA observed in this regard that none of the participants in the rulemaking proceedings had presented any new factual data to reduce the "substantial uncertainty" confronting the agency (*id.* at 101a). In view of this uncertainty regarding the incremental safety benefits of detachable automatic belts, NHTSA could not

find that the automatic restraint requirement of Modified Standard 208 would meet the need for safety (*id.* at 104a), one of the criteria a safety standard must satisfy. See 15 U.S.C. 1392(a).

ii. NHTSA also concluded that in view of the possibly minimal safety benefits and the substantial cost of implementation, the automatic restraint requirement did not satisfy the statutory mandates that a standard be "reasonable" and "practicable" (Pet. App. 88a, 105a). The agency found that imposition of the passive restraint requirement would produce an annual nationwide price effect of approximately $1 billion, without any assurance that consumers would receive offsetting discounts on insurance premiums in the foreseeable future (*id.* at 105a, 106a, 117a; see C.A. App. 190, 1241-1242, 1349, 2550-2552).[10]

The agency "[did] not believe that it would be reasonable to require car manufacturers or consumers to bear such substantial costs without more adequate assurance that they will produce benefits" (Pet. App. 106a). Those costs were "particularly unreasonable," NHTSA explained, given the likelihood that other alternatives, such as its planned educational campaign to increase usage of manual belts, could accomplish the goal of increased usage at "greatly reduced costs" (*id.* at 107a; see *id.* at 111a-112a). An educational effort, NHTSA reasoned, has the advantage of reaching not only those purchasers of new cars who are likely to utilize passive restraints, but also persons driving in cars already on the road (*id.* at 111a-112a).[11]

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[10] In addition, NHTSA estimated that Modified Standard 208 would entail additional fuel costs of up to $150 million annually (Pet. App. 106a, 117a; C.A. App. 208).

[11] A related factor was equity in the distribution of costs: "The automatic restraint requirements of the standard would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may

iii. In addition, NHTSA concluded that the automatic restraint requirement might have an adverse effect on the public's attitude toward safety—an element of the statutory mandates that a standard be "practicable" (Pet. App. 93a) and "meet the need for motor vehicle safety" (*id.* at 114a). Given the obtrusiveness, relative expense, and potentially limited benefits of detachable belts, NHTSA feared that many consumers would regard the automatic restraint requirement as an expensive example of ineffective regulation (*id.* at 108a). These factors, NHTSA reasoned, could lead to a "poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future" (*ibid.*, quoting Secretary Coleman's 1976 Decision, C.A. App. 2073) and adversely affect public attitudes toward safety measures in general (*ibid.*). Moreover, NHTSA observed that some dissatisfied consumers might even "cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system." In NHTSA's view, these were "serious concerns for an agency charged by statute with taking steps appropriate for addressing safety problems that arise not only in the short term but also the long term" (*id.* at 108a-109a). See also *id.* at 114a-115a.

iv. The agency also rejected the option of requiring that all automatic belts have some use-compelling feature—*e.g.*, an ignition interlock to compel refastening of a detachable belt or installation of nondetachable passive belts. NHTSA noted that it lacked statutory authority to require ignition interlocks (see 15 U.S.C. 1410b(b)(1)) and that the history of congressional reaction to interlocks suggested "that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system" (Pet. App. 109a-110a). NHTSA further explained that a use-compelling feature could actually be counterproductive because of a "widespread, latent and irrational fear in many members

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or may not be induced by the automatic restraints to commence regular restraint usage" (Pet. App. 109a).

of the public that they could be trapped by the seat belt after a crash" (*id.* at 110a), a fear that might contribute to the decision of many persons not to wear a seat belt at all (*ibid.*). In the agency's view, it would be "highly inappropriate" to impose a technology that might aggravate that fear without first attempting a thorough education of the public (*ibid.*). In addition, NHTSA was "unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would" (*ibid.*).

v. NHTSA stressed that its rescission of the passive restraint requirement at this time did not foreclose the option of reopening rulemaking in the future, depending upon further experience in the usage of manual and automatic belts and the degree of increased public understanding and acceptance of the need for use-inducing or automatic protection alternatives (Pet. App. 115a-116a). NHTSA also noted its regret that Secretary Coleman's proposed demonstration project and accompanying educational campaign had never been placed into effect, so that the experience of those efforts would now be available (*id.* at 110a-111a). Accordingly, the agency expressed its intention to undertake an educational campaign in cooperation with the States and private sector and to initiate efforts with automobile manufacturers to ensure that potential developments in automatic crash protection technology would not be lost (*id.* at 107a, 111a-112a, 115a-116a, 117a-118a).[12]

3. On petitions for review, the United States Court of Appeals for the District of Columbia Circuit held that NHTSA's rescission of the automatic restraint require-

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[12] On October 25, 1982, NHTSA published a request for proposals for an airbag demonstration project to design, fabricate, and evaluate a kit for retrofitting the automobiles of one or more state police fleets with airbags. Commerce Business Daily, Oct. 25, 1982, at 1, col. 2. In addition, NHTSA has entered into an agreement with the General Services Administration for the purchase by the federal government of 5,000 1985 model year vehicles equipped with airbags. Wall Street Journal, Dec. 15, 1982, at 17.

ment was arbitrary and capricious. The court of appeals remarked that "rescission more resembles agency refusal to act than an agency decision to act" and that it is "only in the rarest and most compelling circumstances that courts overturn an agency's ' "expert" determination not to pursue a particular program or policy at a given time' " (Pet. App. 25a, quoting *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818-819 (D.C. Cir. 1981)). In this case, however, the court concluded that NHTSA's discretion to rescind the passive restraint requirement had been restricted by congressional "reaction" to the passive restraint issue, even though the court acknowledged that in none of the instances upon which it relied did that reaction take the form of "positive law" (Pet. App. 46a). The court found that NHTSA's action within this narrowed ambit of discretion was arbitrary and capricious for two general reasons:

a. The court found insufficient as a basis for rescission NHTSA's conclusion that it could not reliably predict an increase in usage under the Standard as written (Pet. App. 50a-54a). The Court expressly accepted as reasonable the first two of the three findings upon which NHTSA relied in reaching this conclusion: that most manufacturers planned to install detachable belts and that a detachable belt, once detached, is "functionally equivalent" to a manual belt (*id.* at 50a-51a). With respect to the third of NHTSA's findings, the court similarly conceded that there may well be "substantial uncertainty" about the increase in seatbelt usage rates that can be predicted if detachable belts are widely used (*id.* at 51a). But the court did not find this uncertainty to be a sufficient basis for NHTSA's action. The appropriate question in the court's view was not whether there was evidence showing that usage rates actually would increase by an amount necessary to justify the Standard, but rather whether NHTSA could point to evidence affirmatively showing that usage rates would *not* increase by such an amount (*ibid.*).

The court found that the evidence in the record did not sustain what it held to be NHTSA's burden on this issue. Moreover, the court reasoned that if experience with passive belts now in use could not be the basis for predicting usage rates under the Standard, "then only a well justified refusal to seek more evidence could render rescission non-arbitrary" (Pet. App. 52a-53a).

b. A majority of the panel also concluded that the rescission of the passive restraint requirement was arbitrary and capricious because NHTSA did not sufficiently consider certain alternatives to rescission (Pet. 54a-68a).[13] The court stressed that NHTSA was "impressively thorough and careful" in reviewing the three alternatives to rescission that it had set forth in its April 1981 Notice of Proposed Rulemaking: reversing the sequence of compliance, ordering simultaneous compliance, and exempting the front center seating position (Pet. App. 55a). But the court believed that other alternatives should have been considered as well.

The court first faulted NHTSA's consideration of the possibility of requiring manufacturers to install nondetachable rather than detachable, automatic belts. The court questioned whether detachable belts are "passive" restraints if, upon detachment, they resemble manual belts (Pet. App. 57a). In addition, the court found insufficient the reasons given by the agency for declining to permit only nondetachable continuous belts—the congressional reaction in 1974 to ignition interlocks, another use-compelling feature; the fear of many members of the public of being trapped; and NHTSA's determination that the cause of safety would not be advanced by a device that might make it more difficult to extricate the occupant after an accident (*id.* at 60a-62a).

The court also held that NHTSA should have considered whether to require the installation of airbags (Pet. App. 62a-65a). The court acknowledged, however,

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[13] Judge Edwards did not accept the majority's discussion of possible alternative courses of action as a basis for decision in this case (Pet. App. 75a).

that the cost of airbags ranged from $200 to $1000 per unit, depending upon economies of scale, and that NHTSA had considered these costs in its regulatory impact analysis (*id.* at 65a-66a).

c. Although the court of appeals invalidated NHTSA's rescission of the automatic restraint provisions of Modified Standard 208, the court expressly declined the suggestion of respondents State Farm and NAII that the standard take effect by September 1982 or September 1983 (Pet. App. 72a). The court noted that manufacturers needed sufficient lead time to implement the passive restraint requirement and that its decision did not foreclose NHTSA from rescinding, suspending, or delaying the requirement in the future (*id.* at 53a-54a, 72a-74a). The court allowed NHTSA 30 days "in which to submit a schedule for resolving the questions raised in [the] opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of * * * [Modified Standard 208] or an amended standard" (*id.* at 74a; see also *id.* at 72a).

On July 1, 1982, NHTSA filed with the court of appeals a suggested Notice of Proposed Supplemental Rulemaking setting forth a schedule for seeking comments from interested parties on questions raised by the court's opinion and for issuing a supplemental decision on those questions (Pet. App. 132a-146a). In a memorandum issued on August 4, 1982, the court stated that NHTSA's proposal was "not inconsistent with the Court's order" (*id.* at 82a). Nonetheless, the court, sua sponte, issued an order on August 4, 1982, staying the compliance date for the passive restraint requirement only until September 1, 1983. The order permitted NHTSA until October 1, 1982 to advise the court whether that compliance date was achievable or whether a longer period was required, "setting forth adequate reasons therefor" (*id.* at 79a-80a).

NHTSA informed the court on October 1, 1982 that, based on representations by manufacturers, it did not ap-

pear that practicable compliance could be achieved before September 1985 (82-354 Pet. Br. App. 44). The court of appeals has not acted in response to NHTSA's filing. However, on November 18, 1982, after this Court granted the petitions for a writ of certiorari, the court of appeals entered an order recalling its mandate (J.A. 16-17).

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. (& Supp. V) 1381 *et seq.*, empowers the Secretary of Transportation to establish motor vehicle safety standards to accomplish the Act's purposes of reducing traffic accidents and deaths and injuries resulting from such accidents. 15 U.S.C. 1381 and 1392(a). Congress provided, however, that any such standard must satisfy certain criteria: it must be "appropriate," "practicable," and "stated in objective terms" and "meet the need for motor vehicle safety," 15 U.S.C. 1392(a), and it must be "reasonable, practicable and appropriate" for each type of vehicle to which it applies. 15 U.S.C. 1392(f)(3).

The Act does not contemplate that a standard once found to satisfy the statutory criteria must remain in effect permanently. To the contrary, 15 U.S.C. 1392(e) expressly provides that the Secretary "may by order amend or revoke any Federal motor vehicle safety standard established under this section." It is evident from the structure and purposes of the Act as a whole that the same statutory criteria that govern the promulgation of a standard in the first instance must inform the Secretary's determination whether the standard should remain in effect or should instead be amended or revoked. 15 U.S.C. 1392(a) and (f). Neither the court of appeals nor respondents have suggested otherwise. NHTSA adhered to these principles in rescinding the passive restraint requirement of Modified Standard 208, concluding that it could no longer find that the Standard would satisfy the

requirements that a standard "meet the need for motor vehicle safety" and be "reasonable" and "practicable."

Under 15 U.S.C. 1392(b), the provisions of the Administrative Procedure Act apply to judicial review of all orders issued by the Secretary establishing, amending, or revoking a safety standard. Because the Safety Act does not require that motor vehicle safety standards or rules amending or revoking such standards "be made on the record after opportunity for an agency hearing" (5 U.S.C. 553(c)), NHTSA is free to follow the notice and comment procedures for informal rulemaking under the APA, 5 U.S.C. 553, as it did in this case, rather than the formal rulemaking procedures prescribed by 5 U.S.C. (& Supp. V) 556 and 5 U.S.C. 557.[14] Accordingly, as the court of appeals held (Pet. App. 25a-26a), and as respondents concede (State Farm Br. in Opp. 9-10; NAII Br. in Opp. 5-6), an order establishing, amending, or revoking a motor vehicle safety standard is subject to judicial review under the APA only to the extent of ensuring that NHTSA's action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-803 (1978); *Camp* v. *Pitts*, 411 U.S. 138, 140-141 (1973).[15]

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[14] H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 7 (1966); 112 Cong. Rec. 21487 (1966) (remarks of Sen. Magnuson); *Automotive Parts & Accessories Association* v. *Boyd*, 407 F.2d 330, 332-337 (D.C. Cir. 1968). Compare *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

[15] See *Pacific Legal Foundation* v. *Department of Transportation*, *supra*, 593 F.2d at 1343; *National Tire Dealers & Retreaders Association, Inc.* v. *Brinegar*, 491 F.2d 31, 35 (D.C. Cir. 1974); *Automotive Parts & Accessories Association* v. *Boyd*, 407 F.2d 330, 337 (D.C. Cir. 1968); *B. F. Goodrich Co.* v. *Department of Transportation*, 541 F.2d 1178, 1181-1182 (6th Cir. 1976); *Boating Industry Association* v. *Boyd*, 409 F.2d 408, 411 (7th Cir. 1969); cf. *PACCAR, Inc.* v. *National Highway Traffic Safety Administration*, 573 F.2d 632, 636 (9th Cir.), cert. denied, 439 U.S. 862 (1978); *Associated*

This Court has stressed that the arbitrary and capricious standard of judicial review is "a narrow one" and that "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Agency rules subject to review under this standard may be set aside only "if they are not rational and based on consideration of the relevant factors." *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 803; see also *id.* at 805, 814; *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 413-416; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974). NHTSA's rescission of the passive restraint requirement plainly was not arbitrary or capricious under these principles.

The agency's explanation of its reasons for rescission contained an extensive "consideration of the relevant factors" Congress specified in the Act itself as prerequisites for the imposition of a motor vehicle safety standard. ~~for the imposition of a motor vehicle safety standard. Th~~ The agency's consideration of these factors also plainly was "rational." The court of appeals itself sustained as reasonable the first two of the three factual determinations that led NHTSA to conclude that it could no longer find that the passive restraint requirement would meet the need for motor vehicle safety: (i) that most automobile manufacturers intended to comply with the Standard by installing detachable passive belts, and (ii) that such a belt, once detached, becomes identical to a manual belt (Pet. App. 50a, 96a, 98a). With respect to NHTSA's third finding, the court of appeals similarly conceded that "[t]here may well be 'substantial uncertainty' about the

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Industries of New York State, Inc. v. *United States Department of Labor*, 487 F.2d 342, 348 (2d Cir. 1973); but see *Chrysler Corp.* v. *Department of Transportation*, *supra*, 472 F.2d at 667-670. Under 5 U.S.C. 706(2)(B)-(D), rules promulgated following informal rulemaking procedures also may be set aside if they are contrary to the Constitution, in excess of statutory authority or short of statutory right, or without observance of procedure required by law. These bases of judicial review under the APA are not at issue here.

seatbelt usage rates that can be predicted if detachable belts are widely used" (*id.* at 51a). The court of appeals also did not question NHTSA's estimate that the costs of implementing Modified Standard 208 would exceed $1 billion annually (*id.* at 16a-17a, 105a) or NHTSA's interpretation of the Act as requiring that any potential safety benefit be weighed against these costs in determining whether the Standard satisfies the statutory requirements that a safety standard be "reasonable" and "practicable" (*id.* at 16a-17a, 88a, 93, 105a).[16]

Given the acknowledged uncertainty regarding whether any significant increase in usage rates of seatbelts could be expected under Modified Standard 208, it manifestly was reasonable for NHTSA to withdraw the passive restraint requirement before it took effect, rather than to impose its substantial costs and burdens on the motoring public and automobile manufacturers. There was thus a "'rational connection between the facts found and the choice made'" (*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 285, quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). Because the court of appeals sustained NHTSA's findings in the relevant respects, it should have sustained NHTSA's rescission of Modified Standard 208 as well.[17]

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[16] See also S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966); 112 Cong. Rec. 14245 (1966) (remarks of Sen. Lausche); *id.* at 19648 (remarks of Reps. Dingell & Staggers); *H & H Tire Co.* v. *United States Department of Transportation*, 471 F.2d 350, 353-354 (7th Cir. 1972); *id.* at 356-357 (Stevens, J., concurring).

[17] Because the court of appeals sustained NHTSA's findings in the relevant respects and because its holding rested on other grounds, we will not set forth here an extensive discussion of NHTSA's consideration of the statutory criteria and the rationality of its actions in light of those criteria. For present purposes, the validity of NHTSA's action has been sufficiently summarized here and in the Statement. See pages 7-12, *supra*.

The court of appeals nevertheless held that NHTSA's rescission of the passive restraint requirement was arbitrary and capricious. In doing so, it not only misapprehended the role of a reviewing court under the arbitrary and capricious standard; it fashioned in the process no less than three unprecedented and erroneous principles of administrative law.

I.

A. As an initial matter, the court of appeals misconceived the nature of the arbitrary and capricious standard of judicial review. That standard was intended to permit a reviewing court to set aside administrative action only where the agency has acted irrationally or exercised its power in such an unreasonable manner that it must be deemed to be unauthorized and therefore "not in accordance with law." 5 U.S.C. 706(2)(A).

B. Ignoring these limitations, the court of appeals held that in order for an agency to rescind a rule—even one that has yet to take effect—it is not sufficient that the agency has developed substantial uncertainty that the rule will in fact produce the benefits on which its initial promulgation was premised. The agency instead must affirmatively establish to the satisfaction of the reviewing court that the rule in fact will not produce such benefits before it may be revoked. In other words, evidentiary doubts that would have allowed, indeed perhaps required, an agency not to issue a regulation in the first instance are insufficient to permit that agency, on further reflection, to withdraw the regulation.

This unprecedented result disregards the explicit statutory limitations on judicial review contained in the Administrative Procedure Act. It cannot be arbitrary or capricious for an agency to conclude that there should be some firm indication that a regulation will serve a useful purpose before imposing its costs and burdens, especially those of the magnitude involved here, upon the public. The court of appeals' ruling also is inconsistent with the decisions of this Court recognizing that administrative

agencies must retain maximum flexibility to adapt their regulatory policies to changing circumstances.

C. It was equally erroneous for the court of appeals to hold NHTSA's action arbitrary and capricious because the agency did not, in the court's view, sufficiently consider certain alternative courses of action. NHTSA of course did thoroughly consider the alternatives set forth in the Notice of Proposed Rulemaking, as well as the possibility of requiring that all passive belts be nondetachable. But in addition, nothing in the Safety Act or the APA prohibited NHTSA from rescinding the particular passive restraint standard that previously had been promulgated before considering whether some other passive restraint requirement would satisfy the statutory criteria. Rescission was especially prudent in view of the acknowledged defects of Modified Standard 208 as it then read and its imminent effective date of September 1982, which would have required expensive compliance efforts by automobile manufacturers. The court of appeals' insistence that the alternatives it cited be considered in the rescission proceedings themselves, rather than at a later date, is inconsistent with the teaching of *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), that courts may not impose additional procedural requirements on administrative agencies.

D. The court of appeals also erred in its reliance upon what it termed the "legislative reaction" to the passive restraint issue. The court acknowledged that in none of the instances upon which it relied had Congress enacted positive law requiring NHTSA to promulgate a passive restraint standard, and that Congress had merely failed to prohibit NHTSA from doing so and had failed to exercise a legislative veto of Modified Standard 208 when it was promulgated in 1977. Such congressional inaction, and the debates surrounding it, did not abrogate NHTSA's preexisting statutory authority and responsibility to determine whether Modified Standard 208 satisfied the statutory requirements. In any event, the legislative

activities relating to NHTSA's consideration of passive restraints, far from indicating a firm endorsement, demonstrate an abiding congressional concern and indeed ambivalence regarding mandatory passive restraints.

II.

Even if the court of appeals were correct that NHTSA's rescission of the passive restraint requirement was arbitrary and capricious, the court should have remanded to the agency to afford it the opportunity to remedy the defects identified by the court and to permit the agency to consider an appropriate effective date.

ARGUMENT

I. THE RESCISSION OF THE PASSIVE RESTRAINT REQUIREMENT OF MODIFIED STANDARD 208 WAS NOT ARBITRARY AND CAPRICIOUS

A. The Arbitrary And Capricious Standard Of Judicial Review Reflects The Deference Congress Intended To Be Accorded Agency Policy Choices Within A Statutorily Prescribed Range And Is Consistent With The Legislative Nature Of Agency Rulemaking

1. The text and origins of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, make clear that the arbitrary and capricious standard of judicial review was not intended to permit a court to interfere with an agency's expert judgment as to how statutory policy should be implemented within the limits established by Congress. "'[T]he fact that [a court] might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter.'" *CBS, Inc.* v. *FCC*, 453 U.S. 367, 394 (1981), quoting *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). The arbitrary and capricious standard of review represents, rather, an outer limit on the exercise of administrative

discretion. It was intended for those rare situations in which the action in question may literally fall within the scope of the agency's power, but in which the power was exercised in a manner that so far departs from what must reasonably have been in the contemplation of Congress (or from the restraints on arbitrary governmental action imposed by the Due Process Clause of the Fifth Amendment) as to be, in substance if not in form, beyond the agency's authority.

This understanding of the applicable scope of judicial review is reflected in the language of 5 U.S.C. 706(2)(A), which provides that a reviewing court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The words "arbitrary," "capricious" and "abuse of discretion" are recited with such regularity in the domain of administrative law that their very familiarity may have come to mask their intended meaning. Given their ordinary meaning, however, these terms in fact connote a willful irrationality, randomness, whim, or impropriety in the exercise of congressionally delegated power.[18] Similarly, the use of the word "otherwise" in introducing the concluding phrase in 5 U.S.C. 706(2)(A) underscores that a court is authorized by that provision to set aside agency action challenged as arbitrary, capricious, or an abuse of discretion only in those situations in which it is of a type that must be deemed "not in accordance with law" and therefore not authorized by *Congress*. The reviewing court's own view that the agency action was unwise or erroneous is insufficient.

The legislative history of the APA confirms this interpretation of 5 U.S.C. 706 (2)(A). Section 10(e) of the APA, 5 U.S.C. 706, was not intended to establish broad new standards for judicial review of administrative

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[18] See *Webster's Third International Dictionary* (1976), at 8 ("abuse"), 110 ("arbitrary"), and 333 ("capricious").

action. Rather, the APA largely restated prevailing principles of judicial review.[19] As the Senate Judiciary Committee explained:

> It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized (see *Final Report*, Attorney General's Committee, pp. 87 *et seq.* [20]). The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution (*Interstate Commerce Commission* v. *Illinois Cent. R. Co.*, 215 U.S. 452, 470 (1910); *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U.S. 541, 547 (1912)) and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the Fifth Amendment, applicable to the Federal Government (*New York & Queens Gas Co.* v. *McCall*, 245 U.S. 345, 348 (1917)). The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administratve record may be made.

Senate Judiciary Committee Print (June 1945), as reproduced in *Legislative History, Adminstratve Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 39 (1946).

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[19] See S. Rep. No. 752, 79th Cong., 1st Sess. 38, 43-44 (1945); *Attorney General's Manual on the Administrative Procedure Act* 93, 108 (1947). This Court has given weight to the Attorney General's contemporaneous interpretation of the APA, since the Justice Department was heavily involved in the legislative process that resulted in its enactment. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 546.

[20] *Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure Appointed by the Attorney General*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (hereinafter "*Final Report*").

This description of the judicial review provisions of the APA is especially instructive here for several reasons.

First, in *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 470 (1910), cited by the Committee, the Court stated:

> Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

These three bases of judicial review find direct analogs in the first three subsections of 5 U.S.C. 706(2).

The first and second factors described by the Court in *Illinois Central R.R.* are reflected in 5 U.S.C. 706(2)(B) and (C), which authorize a reviewing court to set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The third basis for setting aside agency action identified by the Court is, in turn, reflected in the arbitrary and capricious standard of review in 5 U.S.C. 706(2)(A). This direct parallel thus confirms that the arbitrary and capricious standard was intended to permit a reviewing court to set aside agency action only where power is exercised in such an unreasonable manner as to be, in effect, the equivalent of action that is outside of the scope of the authority delegated to the agency. The formulations employed by the Court in *ICC*

v. *Union Pacific R.R.*, 222 U.S. 541, 547 (1912), and *New York & Queens Gas Co.* v. *McCall*, 245 U.S. 345, 348 (1917), also cited by the Senate Committee, are similar.[21]

It also is instructive that in its explanation of Section 10(e) of the APA, the Senate Judiciary Committee compared the standards of review under the APA to the minimum standards thought to be necessary to satisfy the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. This suggests that where the validity of an agency rule is concerned, a reviewing court charged with the task of determining whether the rule is authorized by the governing statute performs a function akin to determining whether a statute is authorized by the Constitution. This analogy is, of course, reinforced by decisions of this Court recognizing that agency regulations of general applicability that have the force and effect of law are much like legislation and, indeed, are characterized as "legislative" rules. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977); see also *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 663 (1980)

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[21] In language presaging its later decisions under the APA, the Court stressed in *Illinois Central R.R.* that it could not, "under the guise of exerting judicial power, usurp merely administrative function by setting aside a lawful administrative order upon [the Court's] conception as to whether the administrative power has been wisely exercised." 215 U.S. at 470. Under the pre-APA cases, then, it was not sufficient for a court to set aside administrative action that it "shall appear to be unwise or burdensome or inferior to another," since "[e]rror or unwisdom is not equivalent to abuse." *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936); see also *id.* at 237 (regulations could be invalidated if they were "the expression of a whim rather than an exercise of judgment"); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186 (1935); and *Baltimore & Ohio R.R.* v. *Pitcairn Coal Co.*, 215 U.S. 481, 494 (1910), and *Kansas City Southern Ry.* v. *United States*, 231 U.S. 423, 443-444 (1913), cited in *New York & Queens Gas Co.* v. *McCall*, *supra*, 245 U.S. at 348.

(Burger, C.J., concurring).[22] In much the same way as a legislature, albeit within the narrower limits defined by Congress itself, administrative agencies are charged with the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 293.

Except where an Act of Congress contravenes a specific constitutional limitation, a court may strike down the statute only if it is not rationally related to a legitimate governmental purpose. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981); *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). This Court's formulation of the test for assessing the validity of agency regulations under the arbitrary and capricious test is quite similar: such rules may be set aside only "if they are not rational and based on a consideration of the relevant factors." *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 803.[23]

2. The foregoing discussion of the text and background of 5 U.S.C. 706(2)(A) demonstrates that NHTSA's action in this case was not arbitrary or capricious. Rescission of the passive restraint requirement plainly was within the limits prescribed by Congress, for the Safety Act expressly authorizes the Secretary to "amend or revoke any Federal motor vehicle safety standard" (15 U.S.C. 1392(e)). Nor is there anything to suggest that

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[22] The *Final Report* of the Attorney General's Committee on Administrative Procedure states (at 27), for example, that "substantive regulations have many of the attributes of statutes themselves and are well described as subordinate legislation." See also S. Rep. No. 752, 79th Cong., 1st Sess. 39 (1945).

[23] The *Final Report* of the Attorney General's Committee on Administrative Procedure proposed a similar standard (at 117): whether there is "a rational relationship between a regulation and the governing statute."

NHTSA exercised its conceded power in such an unreasonable manner that it must be deemed "not in accordance with law" and hence, in substance, outside of the limits of authority conferred by Congress. To the contrary, the agency's exercise of its power under 15 U.S.C. 1392(e) was strictly "in accordance with law": the decision to rescind was based on the agency's conclusion that it could not affirmatively find that the criteria set forth in the law itself were satisfied, in view of the substantial uncertainty, acknowledged by the court below, that any significant safety benefits would accrue. A decision so directly related to the statutory criteria, taken pursuant to an express grant of authority to amend or revoke a safety standard, cannot be thought to have so far departed from what may reasonably have been within the contemplation of Congress as to be deemed unauthorized.

The parallel between the statutory arbitrary and capricious standard and constitutional restraints further reinforces this conclusion. Applying the usual constitutional test, NHTSA's order rescinding the passive restraint requirement plainly is rationally related to the purposes and limitations of the Safety Act. But in addition, it is significant that absent invidious purpose or classification, the Constitution imposes no restrictions on the authority of a legislature to repeal a statute—even though a rational basis would have been necessary to support enactment of the statute. *Crawford* v. *Board of Education of Los Angeles*, No. 81-38 (June 30, 1982), slip op. 7, 10-11; *Hunter* v. *Erickson*, 393 U.S. 385, 390 n.5 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369, 375 (1967).[24] This suggests that a court must be extremely reluctant under the APA to set aside an agency's decision to rescind a regulation that was not required by its authorizing statute, irrespective of whatever standard of reasonable-

[24] The Constitution likewise affords an administrative body broad latitude to rescind prior action. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531 n.5 (1979); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 414 (1977).

ness is applicable to the promulgation of the regulation. A rule of administrative law that tends to "lock in" an agency so that action taken cannot be undone, like a constitutional rule to the same effect, would in the long run deter valuable experimentation. *Crawford* v. *Board of Education of Los Angeles, supra*, slip op. 7, 10-11 & n.22; *Palmer* v. *Thompson*, 403 U.S. 217, 228 (1971) (Burger, C.J., concurring).

B. The Court Of Appeals Erred In Concluding That It Was Arbitrary And Capricious For NHTSA To Rescind The Passive Restraint Requirement On The Basis Of Substantial Uncertainty That It Would Produce Significant Safety Benefits

Despite NHTSA's thorough and reasoned assessment of Modified Standard 208 in light of the relevant statutory criteria, the court of appeals held that NHTSA acted arbitrarily and capriciously in rescinding the passive restraint requirement. In the court's view, it was not sufficient, in order for NHTSA to rescind the requirement, that there was "substantial uncertainty" whether usage rates would increase with the installation of detachable passive belts and therefore whether the requirement would actually produce significant safety benefits. Rather, the court held, NHTSA must affirmatively demonstrate to the satisfaction of the reviewing court that Modified Standard 208 will *not* produce the benefits on which its promulgation in 1977 was premised before it may amend the Standard (Pet. App. 51a). This unprecedented holding is flatly inconsistent with the limited role of a reviewing court under the arbitrary and capricious standard.

The court pointed to nothing in the language or legislative history of either the APA or the Safety Act to support its holding. Nor did it cite any judicial precedent. The best the court could do was to state the point in reverse: it would be unreasonable, the court explained, for an agency to promulgate a regulation in the first

instance simply because of "substantial uncertainty" that the status quo—*i.e.*, the absence of a regulation—was any better (Pet. App. 51a). Conversely, the court apparently believed, an agency cannot alter the status quo by rescinding a regulation on the basis of "substantial uncertainty" that the regulation will accomplish its intended purpose in an efficient manner. This reasoning is both illogical and contrary to the text and structure of the Safety Act.

The court of appeals is quite correct that the Secretary would be justified in declining to promulgate a safety standard in the first instance if he were uncertain that the standard would be better than no standard at all, because in that event the Secretary might well be unable to make an affirmative finding that the proposal satisfied the statutory requirements that a standard be appropriate, reasonable, practicable, and meet the need for motor vehicle safety. But the court of appeals drew the wrong conclusion from its initial premise. It is precisely because the Secretary reasonably may decline to *issue* a safety standard in the first instance if he has substantial doubts about its efficacy that the Secretary also may decline to *retain* such a standard if he has developed similar doubts. For in the latter situation, no less than the former, the Secretary may be unable to make the affirmative finding that the standard satisfies the statutory criteria for a safety standard to be in effect.[25]

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[25] The court of appeals itself appeared to recognize this point, conceding that "[i]mplicitly, the perpetuation of a regulation also involves a decision that its continuation is worthwhile, and reasonable decisionmaking requires that this too be supported by reasons" (Pet. App. 54a). The court stated that if NHTSA was uncertain that usage rates would increase under the Standard as written, it reasonably could have suspended the Standard (*ibid.*). The court failed to explain why, if the agency would be free to suspend the Standard (presumably for as long as the uncertainty persisted), the agency was not free to rescind it. Whether the Standard were suspended or rescinded, the agency would be free to reinstate the Standard at a later date if evidence indicated that it would fulfill the statutory purposes.

Nor is the court of appeals' holding defensible on the theory that an agency is required to make an affirmative showing whenever it departs from the status quo, whether the movement is from the absence to the existence of a regulation on a particular subject, or the reverse. The pertinent inquiry is not whether the agency has altered the status quo or maintained it, but rather what limits the governing statute places on the agency action in question. In this case, although the Safety Act requires the Secretary to make an affirmative finding that a standard satisfies the statutory criteria before he may place the standard into effect, the Act requires no affirmative finding that the statutory criteria will not be satisfied for there to be an *absence* of a safety standard in a particular area. The court of appeals therefore was without authority to insist that NHTSA affirmatively establish to the court's satisfaction that the passive restraint requirement would not produce the requisite safety benefits before it could rescind that requirement.[26]

As the court of appeals recognized, then, "rescission more resembles agency refusal to act than an agency decision to act" (Pet. App. 25a), because the effect of rescission is that the agency has refused to supply a regulation on the subject in question. And as the court of appeals further acknowledged, "it is only in the rarest and most compelling circumstances that courts overturn an agency's '"expert" determination not to pursue a particular program or policy at a given time'" (*ibid.*, citing *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818-819 (D.C. Cir. 1981), and *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979)); see also S. Rep. No. 752, *supra*, at 44. No such compelling circumstances are present here. The responsibility of the court below was limited to

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[26] The Safety Act essentially embodies a congressional presumption *against* regulation, which may only be overcome in specifically defined circumstances. The court of appeals' opinion, in contrast, embodies the opposite presumption in any area in which a safety standard has been promulgated.

determining whether NHTSA rationally could have believed in the circumstances presented that sufficient uncertainty existed to counsel rescission of the rule. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416. Once the court of appeals concluded that NHTSA was reasonable in its assessment of the uncertainty regarding usage rates (Pet. App. 51a), its role in reviewing NHTSA's action was at an end.[27]

Agency action is not rendered invalid because the record does not contain firm proof that the eventualities on

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[27] The court of appeals stated that if NHTSA believed that passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, "then only a well justified refusal to seek more evidence could render rescission non-arbitrary" (Pet. App. 53a). The only authority the court cited for this proposition was its own prior decision in *National Association of Demolition Contractors* v. *Costle*, 565 F.2d 748, 751-752 (1977). But the court there *sustained* EPA's decision not to conduct the test in question. In any event, that case involved a challenge to EPA's failure to conduct a test before *adopting* a regulation, and it therefore presented the question whether further evidence was necessary to sustain an agency's action imposing a regulatory burden. That decision does not support the imposition of a requirement that an agency obtain additional evidence before rescinding a regulation.

Even if the court of appeals were correct that generation of further data on usage rates might be desirable, it clearly exceeded its authority in requiring that Modified Standard 208 remain in effect until those data were obtained. The question whether manufacturers and consumers should be required to devote their scarce resources to compliance with the Standard pending further study is a matter uniquely within the competence and discretion of the expert agency to which Congress has entrusted these difficult issues of statutory policy. Cf. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, *supra*, 423 U.S. at 329-331. Moreover, 15 U.S.C. 1392(f)(1) provides that in prescribing standards, the Secretary shall "consider relevant *available* motor vehicle safety data" (emphasis added). This language suggests that a safety standard should not be in effect if the data thought necessary to support it are not available. If this Court sustains the rescission of the passive restraint requirement, NHTSA will of course remain free to reinstate such a requirement in the future if further experience or studies show that it would satisfy the statutory criteria.

which the action is premised will actually occur, where the agency's determinations are primarily of a judgmental or predictive nature. "In such circumstances complete factual support in the record for the [agency's] judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). See also *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-595 (1981). It likewise is not "possible or required" in this case that NHTSA point to concrete data on the probable use of detachable passive belts under a safety standard that has not yet gone into effect. Especially where, as here, an agency seeks merely to withdraw a burdensome rule that was premised on a prior forecast of benefits that has since been found to be of doubtful validity, rather than to impose new burdens in the face of uncertain conditions, the agency cannot be precluded from acting because it has been unable to go further and develop evidence to prove that the forecast was actually wrong. Cf. *NAACP* v. *FCC*, 682 F.2d 993, 1000-1001 (D.C. Cir. 1982).

Moreover, this Court has stressed that an administrative agency must remain free to reassess its regulatory policies and adapt them to changing circumstances. *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 811; *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967). An agency "should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *FCC* v. *WNCN Listeners Guild*, *supra*, 450 U.S. at 603, citing *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943). See *Chrysler Corp.* v. *Department of Transportation*, *supra*, 472 F.2d at 673; *PACCAR, Inc.* v.

National Highway Traffic Safety Administration, 573 F.2d 632, 642 (9th Cir.), cert. denied, 439 U.S. 862 (1978). The decision of the court of appeals conflicts with these principles of administrative discretion and flexibility by erecting a judicial barrier to the revision of regulatory policy, in the form of a requirement that the agency first convince the reviewing court that any previously promulgated rule will not serve the statutory purposes. The long term effect under this and like statutes [28] may be not only to freeze existing regulations that have become outmoded, but to chill experimentation in the future for fear that what is done cannot later be readily undone if it proves unwise or ineffective. Cf. *Crawford* v. *Board of Education of Los Angeles*, *supra*, slip op. 7, 10-11 & n.22.

To be sure, where an agency changes from a "settled course," it may have some duty to explain that change. *Atchison, T & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-808 (1973). But this procedural requirement does not alter an agency's *substantive* authority to "flatly repudiate [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy." *Id.* at 808. Here, as explained above (see pages 7-11, *supra*), NHTSA fully explained its decision to rescind the passive restraint requirement in light of such changed circumstances.

In any event, there hardly has been a "settled course" by NHTSA over the years regarding the *mandating* of passive restraints. Although NHTSA has considered the issue of automatic restraints since 1969, no requirement that such devices be installed has ever gone into effect. With the exception of the periods from 1970 to 1972 and from 1977 to 1981, when a mandatory passive restraint requirement was in place for the *future*, the issue has at most only been under consideration by the agency or, as

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[28] See, *e.g.*, 15 U.S.C. 77sss(a); 15 U.S.C. (Supp. V) 1193(j); 15 U.S.C. (Supp. V) 2056(a); 21 U.S.C. 360d(a)(2)(A); 30 U.S.C. (Supp. V) 811(a).

in the period following Secretary Coleman's decision and now, subject to an affirmative judgment that automatic restraints should not be mandated under prevailing conditions. See pages 3-8, *supra*.[29] Indeed, Secretary Adams' promulgation of Modified Standard 208 was itself a sharp break with Secretary Coleman's decision just four months earlier, and that break occurred in the absence of an intervening change of circumstances of the kind that warranted reexamination of the rule in 1981.

C. The Decision To Rescind The Passive Restraint Requirement In Modified Standard 208 Was Not Rendered Arbitrary And Capricious Simply Because The Agency Did Not First Consider Whether Some Other Version Of A Passive Restraint Requirement Would Satisfy The Statutory Criteria

The court of appeals also held that, even if NHTSA had correctly concluded that Modified Standard 208 is "unjustified as written" (Pet. App. 49a), its rescission of the passive restraint requirement of Modified Standard 208 was arbitrary and capricious because the agency "artificially foreclosed attempts to further the purpose of the Safety Act" by not considering certain other alternative courses of action (*ibid.*; see *id.* at 54a-66a). This holding is clearly wrong, because NHTSA's rescission of one particular version of a passive restraint requirement in no way foreclosed the consideration of other options.

As an initial matter, the court of appeals itself acknowledged that the agency adequately considered the three alternatives to rescission that were set forth in the April 9, 1981 Notice of Proposed Rulemaking: reversing the sequence of compliance; requiring simultaneous compliance; and amending the Standard to exempt the front

[29] Nor has NHTSA abandoned its support of passive restraints. Such restraints remain one means of compliance with Modified Standard 208 (49 C.F.R. 571.208/S4.1.2.1), and NHTSA could reinstate a mandatory passive restraint requirement at some point in the future if further developments warrant. See also note 27, *supra*.

center seating position. The court found NHTSA's analysis of these alternatives to be "impressively thorough and careful" (Pet. App. 55a & n.32). But the court concluded that NHTSA also should have considered whether to amend the passive restraint requirement to permit compliance by airbags or by belts only if they are nondetachable.

Moreover, NHTSA in fact did consider whether it should mandate some kind of use-compelling device, such as continuous belts. NHTSA concluded that it should not, based on past congressional reaction to use-compelling devices, public fears about being trapped, and the possible complications of extrication after an accident (Pet. App. 109a-112a). These reasons, tied directly to the statutory criteria of practicability and the need for safety, fully supported rejection of this alternative. In addition, the court acknowledged that the cost of airbags ranged from $200 to $1000 per unit, depending upon economies of scale, and that NHTSA had considered those costs in its regulatory impact analysis (*id.* at 65a-66a; see C.A. App. 172).

In any event, the court's insistence that NHTSA consider the airbag and continuous belt alternatives as a condition precedent to rescission of the passive restraint requirement of Modified Standard 208 represents another wholly unwarranted judicial intrusion into the administrative process. The principal and pressing issue before the agency was whether the particular version of a passive restraint standard that had already been promulgated and was scheduled to go into effect in the near future could be found to satisfy the statutory criteria for a motor vehicle safety standard, not whether some other version of a passive restraint standard that had not yet even been proposed for public comment would satisfy those criteria. Once NHTSA determined that it was incapable of funding that the passive restraint requirement as written met the statutory cirteria, it manifestly was reasonable for the agency to move expeditiously to

withdraw that requirement. Otherwise, manufacturers would have had to devote their scarce resources to complying with a safety initiative that posed a considerable risk of being ineffective or even counterproductive.

It is significant in this regard that ever since the Department of Transportation issued its original Standard 208 in 1967, even minor adjustments to the Standard have been identified in notices of proposed rulemaking before adoption. The two alternatives the court identified in this case, however, would have required a major revision of Modified Standard 208 and would have imposed substantial burdens on manufacturers and the public. In these circumstances, had NHTSA actually adopted one of the alternatives suggested by the court, it might have faced challenges from the manufacturers and others on the ground that its notice of proposed rulemaking did not give adequate warning that such a rule might be adopted. See, *e.g.*, *Kollett* v. *Harris*, 619 F.2d 134, 144 (1st Cir. 1980); *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809, 814-815 (D.C. Cir. 1975); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972); see also *Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096, 1097-1098 (1980) (Rehnquist and Powell, JJ., dissenting from the denial of certiorari).

The prospect of procedural challenges to one side, principles of fairness, sound administration, and feasibility almost certainly would have required NHTSA to publish yet another notice of proposed rulemaking specifically addressing the continuous belt and airbag options, and this step would have been taken only after NHTSA had first developed proposed technical performance criteria calculated to satisfy the statutory requirement that a safety standard be stated in objective terms. Rulemaking proceedings of such a complex and controversial nature might well have taken some time for the agency to complete. There is no reason in law, policy, or common sense why NHTSA was required to retain on the books the one passive restraint requirement that it already had evalu-

ated and found wanting while it searched for some other standard that satisfied the statutory requirements. Only the court of appeals' apparent presumption in favor of a passive restraint standard in *some* form can explain its insistence that some version of such a standard remain on the books until mandatory passive restraints were affirmatively shown to be unworkable in all respects.

Moreover, contrary to the court of appeals' observation, NHTSA's rescission of a passive restraint requirement that was expected to be satisfied by installation of detachable belts did not "foreclose" NHTSA from considering in the future other forms of a passive restraint standard or other options for improving occupant protection (Pet. App. 49a). The agency remains free to conduct research and collect data about these alternatives and to consider them more formally in a new rulemaking proceeding initiated by NHTSA itself or requested in a rulemaking petition filed by an interested party pursuant to 5 U.S.C. 553(e). But nothing in the APA or the Safety Act required that other possible courses of action be considered in the rescission proceeding rather than in an independent proceeding focusing more directly on the alternatives. This Court has only recently reiterated the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 544), thereby leaving them free " 'to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties' " (*id.* at 543, quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), and *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). The court of appeals' imposition of its own preferred order of proceeding is inconsistent with this admonition.

It is instructive in this regard that when Congress intends that an agency consider alternative courses of action before reaching a particular decision, it has expressly so provided. For example, the highway statutes involved in *Citizens to Preserve Overton Park* v. *Volpe*

explicitly required the Secretary to consider whether there was a "feasible and prudent alternative" to locating a highway in parkland. 401 U.S. at 411. Similarly, the National Environmental Policy Act, which was the basis of the Court's discussion of the consideration of alternatives in *Vermont Yankee* (435 U.S. at 549-555), explicitly requires that all federal agencies include in every report of major federal action significantly affecting the quality of the human environment "a detailed statement by the responsible official on * * * alternatives to the proposed action." 42 U.S.C. 4332(C)(iii). In *Pillai* v. *CAB*, 485 F.2d 1018, 1029 (D.C. Cir. 1973), cited by the court of appeals (Pet. App. 49a), Congress had enacted a statute for the purpose of conferring a regulatory option on the CAB to be employed in the context of international negotiations such as those at issue in that case, yet the CAB had failed to address that alternative. 485 F.2d at 1027-1029. And in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), also cited by the court below (Pet. App. 56a), the FPC had conceded that under the applicable statute, 16 U.S.C. 803(a), it was required to consider alternatives to licensing that might better protect recreational values. 354 F.2d at 614, 617.

The Safety Act, on the other hand, contains no comparable requirement that alternatives be considered. Nor does the APA. Indeed, in contrast to the detailed consideration of environmental factors required under NEPA, the informal rulemaking provisions of the APA require only the publication of a notice of proposed rulemaking, an opportunity for comment, and the incorporation in the rules adopted of "a concise general statement of their basis and purpose." 5 U.S.C. 553(c). There is no explicit requirement to discuss or consider other possible rules that were not ultimately adopted.[30] Given Congress'

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[30] Compare 5 U.S.C. 557(c)(A), which requires a statement of "findings and conclusions, and the reasons or basis therefor, on all

mandate in one statute of government-wide application—NEPA—that alternatives be considered, courts should be reluctant to read such a requirement into another statute of government-wide application—the APA—that does not expressly so provide.

It is significant, moreover, that *Overton Park*, *Vermont Yankee*, *Pillai*, and *Scenic Hudson* all involved the consideration of alternatives before the agency took action. Even if we assume that the Safety Act and the APA might likewise require NHTSA, before *adopting* a motor vehicle safety standard, to address alternative standards or other courses suggested by interested parties or by NHTSA itself—in order to provide some assurance that the standard ultimately selected is sufficiently "appropriate," "practicable" and "reasonable" and will "meet the need for motor vehicle safety" when compared to others—NHTSA would have no such obligation before *rescinding* a safety standard. There is no requirement that the quoted statutory criteria be satisfied for there to be an absence of a safety standard, and there accordingly is no basis for requiring consideration of alternative means by which the statutory criteria might be met.[31]

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the material issues of fact, law, or discretion presented on the record."

[31] The court of appeals also suggested (Pet. App. 57a-58a) that NHTSA's doubts about the effectiveness of detachable automatic belts in increasing belt usage over the rates experienced for manual belts means that detachable automatic belts might not be "passive restraints" at all. In the court's view, it would be irrational for NHTSA to rescind the passive restraint requirement based on industry plans to install detachable belts that do not even comply with the Standard. This reasoning is erroneous.

It always has been understood that detachable automatic belts comply with Standard 208. Indeed, until 1978, if belts rather than airbags were to be installed to comply with the Standard, such belts were *required* to be detachable by means of a latch mechanism, in order to permit emergency exit. See note 8, *supra*. When attached, a detachable belt provides complete passive protection, be-

D. The Court Of Appeals Erred In Concluding That "Legislative Reaction" To The Passive Restraint Issue, Short Of The Enactment Of Positive Law, Narrowed The Scope Of NHTSA's Discretion To Rescind The Passive Restraint Requirement

Underlying the court of appeals' other holdings, discussed in Parts B and C, *supra*, was its view that NHTSA's discretion under the Safety Act to amend or revoke the mandatory passive restraint provisions of Modified Standard 208 had been restricted by various episodes of "legislative reaction" to the passive restraint issue. The court's reading of the legislative record as reflecting a firm and consistent congressional commitment to mandatory passive restraints is erroneous. But aside from this misreading of the legislative materials, the court's unprecedented suggestion that congressional inaction and the consideration of bills never enacted can somehow narrow an agency's discretion under previously enacted law is inconsistent with the explicit constitutional

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cause no action by the occupant is necessary for the belt to be placed in position around him when the door is closed. That members of the public might use the emergency latch mechanism to detach the belt permanently, as NHTSA predicted, does not undermine the belts' passive nature. The court of appeals' suggestion that such belts do not satisfy Standard 208 therefore is wholly unfounded.

In any event, the court of appeals' speculation about the "passive" nature of detachable belts is a bootstrap. The issue before the court of appeals was not whether a detachable belt satisfies the "passive restraint" requirements of the *Standard*, because NHTSA, in the very action under review here, has rescinded that requirement. A standard expressed in "passive restraint" terms is not compelled by the Act, and the appropriateness of NHTSA's action therefore is not to be measured in those terms. The court instead was required to review NHTSA's decision under the explicit *statutory* criteria of practicability, reasonableness, and the need for safety, on which NHTSA had relied, irrespective of the court's own view of whether detachable belts are "active" or "passive" restraints as a theoretical matter.

prerequisites for according legally binding effect to the actions of Congress.

1. a. The first episode upon which the court of appeals relied was Congress' enactment in 1974 of the prohibition against an ignition interlock standard and of the provision for a legislative veto of any standard requiring or permitting compliance by means of airbags. Pet. App. 33a-36a; see 15 U.S.C. 1410b. As the court of appeals acknowledged (*id.* at 34a), these amendments had their origins in a floor amendment, adopted by the House by an overwhelming vote of 339-49 (120 Cong. Rec. 27822-27823 (1974)), that would have barred NHTSA from requiring ignition interlocks *or* passive restraints (*id.* at 27815). The debates were replete with objections that the interlock standard then in effect interfered with the occupant's freedom of choice and would impose excessive costs (*id.* at 11789, 11969, 16326, 18221, 27815-27822).[32]

The Conference Committee proposed and Congress enacted the compromise embodied in 15 U.S.C. 1410b, which bars ignition interlocks and provides for a legislative veto of any future imposition of a nonbelt passive restraint standard. The Conference Committee substitute reflected the fact that a standard mandating passive restraints had not yet been adopted by NHTSA following the Sixth Circuit's decisions in *Chrysler Corp.* and *Ford Motor* (see pages 4-5, *supra*) and that the Members "[did] not know what lies ahead in the field of passive restraints" in view of questions about the adaptability of airbags to smaller cars, indications that the utility of airbags is limited primarily to head-on collisions, and uncertainty about the cost of airbags. 120 Cong. Rec.

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[32] For the same reasons, the Senate also had gone on record, by passing an amendment to a pending highway aid bill by a vote of 64-21, as opposing the ignition interlock requirement and favoring congressional review of any mandatory passive restraint standard. 120 Cong. Rec. 30558, 30836-30850 (1974).

35637 (1974) (remarks of Rep. Wyman); see also *id.* at 27819-27820, 30849 (letters from Department of Transportation stating that no final decision had yet been made with respect to mandating passive restraints). Congress' restricting of NHTSA's freedom even to *adopt* occupant restraint standards in these circumstances scarcely can be viewed as an endorsement of passive restraints, much less as an expression of intent to restrict NHTSA's freedom to *rescind* whatever passive restraint standard might be adopted in the future because of doubts about its effectiveness.

b. The second "legislative reaction" upon which the court of appeals relied was Congress' failure to exercise a legislative veto of Modified Standard 208 when it was promulgated in 1977. Pet. App. 36a-37a. The court of appeals noted that the Senate voted 65-31 to table a resolution of disapproval, following a debate during which a number of Senators spoke favorably about the Standard, and that the responsible House Committee voted to table a resolution of disapproval. From this, the court leaves the misleading impression of pervasive congressional approval of Secretary Adams' decision. *Ibid.*; 123 Cong. Rec. 33318-33332 (1977). What the court fails to note, however, is the substantial hostility to the Standard in the House of Representatives. The resolution of disapproval had 160 sponsors in the House, and it was tabled in committee by the narrow vote of 16-14. 124 Cong. Rec. 17186 (1978) (remarks of Rep. Shuster); *id.* at 17189 (remarks of Rep. Broomfield).

Indeed, because the full House was deprived of an opportunity to vote on the passive restraint issue in 1977, Representative Shuster offered a floor amendment in 1978 to NHTSA's Fiscal Year 1979 appropriations bill barring the use of funds to implement or enforce any standard that required any motor vehicle to be equipped with an occupant restraint system other than a belt system. Although the Members recognized that the amendment to

the appropriations bill would have limited practical importance because Modified Standard 208 was not scheduled to go into effect until well after the end of Fiscal Year 1979, the rider was touted as the "only vehicle left for Members to express themselves" on the passive restraint issue (124 Cong. Rec. 17186 (1978) (remarks of Rep. Shuster); see also *id.* at 17189 (remarks of Rep. Daniel); *id.* at 17191 (remarks of Rep. Devine); *id.* at 17194 (remarks of Rep. Dingell); *id.* at 17197 (remarks of Rep. Broyhill)). The amendment was adopted by a vote of 237-143 (*id.* at 17199), following an extensive debate during which the Standard was attacked on the grounds that it would be expensive and ineffective and would constitute an irritating and unwarranted expansion of the regulatory role of government at the expense of personal freedom in the same manner as the interlock requirement overturned in 1974. *Id.* at 17186-17199.

Thus, the expression of sentiment by the House of Representatives that was most contemporaneous to the promulgation of Modified Standard 208 was strongly *against* implementation of the passive restraint requirement. The rider was enacted into law, Pub. L. No. 95-335, Section 317, 92 Stat. 450, and it was reenacted in the appropriations act for Fiscal Year 1980, Pub. L. No. 96-131, Section 317, 93 Stat. 1039, following similar debate in the House of Representatives. 125 Cong. Rec. H8055, H8066 (daily ed. Sept. 18, 1979).

c. The final episode upon which the court of appeals relied was Congress' consideration in 1979 and 1980 of proposals, never enacted into law, that would have either overturned or amended Modified Standard 208. Pet. App. 38a-46a. As before, the congressional reaction began with an overwhelming vote of the House of Representatives against mandatory passive restraints—this time, a vote of 320 to 73 in favor of an amendment to a pending authorization bill to bar NHTSA from spending funds to

administer an occupant restraint standard unless the standard permitted the purchaser of the vehicle to select manual rather than passive restraints. 125 Cong. Rec. 12285-12287 (1979).

The Conference Committee reported a substitute measure that would have required NHTSA to amend Standard 208 to postpone the initial compliance date by one year, to reverse the compliance schedule, and to mandate that each of the five largest manufacturers make airbags available in one vehicle line for three years. H.R. Conf. Rep. No. 1371, 96th Cong., 2d Sess. 15-17 (1980). If the Conference Committee's proposal had been enacted into law, it presumably would have constituted a ratification of Modified Standard 208 to the extent that Congress did not order amendment of the Standard.[33] But the proposal was not enacted. It passed the Senate, 126 Cong. Rec. S13506 (daily ed. Sept. 25, 1980), but failed in the House because it did not garner the votes necessary to be passed under a suspension or waiver of the House Rules that barred House conferees from agreeing to new matter. 126 Cong. Rec. H10194-H10198 (daily ed. Oct. 1, 1980), 126 Cong. Rec. H11912-H11918 (daily ed. Dec. 4, 1980).[34]

2. The court of appeals plainly erred in viewing this history as reflecting a congressional commitment to man-

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[33] Even that ratification of the Standard as promulgated in 1977 presumably would not have barred NHTSA from amending the Standard in light of changed circumstances, as it did here. See 126 Cong. Rec. H12120 (daily ed. Dec. 5, 1980) (remarks of Rep. Dingell).

[34] It is ironic that the court of appeals should rely on the 1980 Conference Committee proposal, since that proposal undermines the court's conclusion that NHTSA's action was arbitrary and capricious because it did not first consider the alternatives of requiring automatic belts to be nondetachable and mandating the installation of airbags in all vehicles. The Conference Committee proposal would have required that all automatic belts be *detachable* and that airbags be offered as an *option* only by the five largest manufacturers and only in one line, rather than mandating that they be installed in all vehicles.

datory passive restraints. To the contrary, it reflects at most an ambivalence and political sensitivity on the subject that underscores the impropriety of the court of appeals' substitution of its judgment for that of the expert agency Congress has charged with administering the Safety Act.

However, even assuming that the court of appeals were correct that sentiment in Congress at one time or another has favored passive restraints, the court's reliance on the episodes described above nevertheless was misplaced. Congress has never enacted a *law* mandating the promulgation of a passive restraint standard, as it has, for example, in mandating certain school bus standards. See 15 U.S.C. 1392(i). The court's opinion instead gives legally binding effect to congressional debates, resolutions, and failures to act that fall short of duly enacted law, concluding that such "legislative reaction" requires a more demanding standard of judicial review and has thereby effectively withdrawn a large measure of the discretion NHTSA was accorded under the Safety Act to amend or revoke the passive restraint requirement. This result violates the bicameralism and presentation requirements of Article I, Sections 1, 7, and 8 of the Constitution and conflicts with the doctrine of separation of powers. See Brief for the Immigration and Naturalization Service at 17-40, 44-56, *INS* v. *Chadha* (Nos. 80-1832, 80-2170 and 80-2171, 1981 Term).

This is not a case, like *Udall* v. *Tallman*, 380 U.S. 1, 17-18 (1965), upon which the court of appeals relied (Pet. App. 47a), in which legislative acquiescence in an administrative interpretation of a statute may be cited as evidence of the correctness of that interpretation. NHTSA has not disputed that the Safety Act may be interpreted to authorize the promulgation of a passive restraint standard—*if* NHTSA determines that such a standard satisfies the criteria set forth in the Safety Act. Here, the court of appeals relied upon the legisla-

tive activity not as a guide to the meaning of the Safety Act as originally enacted, but rather as effectively circumscribing the power conferred on NHTSA by that Act to determine whether to issue a motor vehicle safety standard and whether the proposed standard satisfies the statutory criteria.

II. EVEN IF NHTSA'S RESCISSION OF THE PASSIVE RESTRAINT REQUIREMENT WERE INVALID, THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY SETTING AN EFFECTIVE DATE FOR THAT REQUIREMENT PENDING FURTHER PROCEEDINGS

Although the court of appeals, in its June 1, 1982 opinion, set aside NHTSA's rescission of the passive restraint requirement, the court expressly denied the request by respondents State Farm and NAII that Modified Standard 208 take full effect on September 1, 1982 or 1983 (Pet. App. 72a). The court explained that its opinion did not foreclose rescission or suspension of the Standard after further administrative proceedings and that automobile manufacturers "would justifiably feel uncertain" about the technology that would satisfy the Standard because of the possibility that it would be revised after those proceedings (*ibid.*). The court therefore ordered a "remand" to NHTSA with directions to submit to the court within 30 days a schedule for resolving the questions raised by the court's opinion, leading either to a rescission or suspension of the Standard or to a judicially approved schedule for the effective implementation of that or an amended standard (*id.* at 72a, 74a, 161a).

In its August 4, 1982 memorandum, the court of appeals found that NHTSA's proposal for further proceedings to resolve the questions raised by the June 1 opinion was consistent with the court's directions (Pet. App.

82a). Nevertheless, in a reversal of its previous refusal to set an effective date, the court on August 4 ordered that Modified Standard 208 go into effect as written on September 1, 1983 unless NHTSA demonstrated to the court's satisfaction by October 1, 1982 that this effective date was not "achievable" (*id.* at 80a).[35] This action constituted a wholly unwarranted interference with the administrative process.

Given the acknowledged possibility that NHTSA might validly rescind the passive restraint requirement, it was inappropriate for this reason alone for the court of appeals to order compliance with the Standard by a date certain. Moreover, even if it is assumed that a passive restraint requirement ultimately would be retained in Standard 208 in some form, the court itself recognized that that requirement might be revised in a number of significant respects—*e.g.*, to prohibit the use of detachable belts, to require installation of airbags, or to delete the requirement for automatic restraints in the front center seating position (Pet. App. 55a & n.32, 72a). It thus was improper for the court to order compliance with the particular version of a passive restraint requirement that was embodied in Modified Standard 208. This is especially so in view of the inability of the agency charged with administering the Safety Act to find that the Standard with which the manufacturers would be forced to comply even satisfies the statutory criteria of reasonableness and practicability or meets the need for safety.

In addition, the court of appeals' August 4 order impermissibly usurped to that court authority that Congress has conferred on the Secretary. Under 15 U.S.C. 1392(c) and (e), an order establishing, amending or revoking a safety standard shall take effect no later

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[35] The court of appeals has not taken action following NHTSA's filing of October 1, 1982. See pages 15-16, *supra*.

than one year from the date of the order "unless the *Secretary* finds, for good cause shown, that [a] * * * later effective date is in the public interest, and publishes his reasons for such finding" (emphasis added). It therefore was for the Secretary, not the court, to determine in the first instance whether and when Modified Standard 208 should go into effect in its present form, taking into account further proceedings on remand. Cf. *Burlington Northern, Inc.* v. *United States*, No. 81-1008 (Dec. 13, 1982). This determination then would be subject to judicial scrutiny under the arbitrary and capricious standard of review in the same manner as any other amendment to a safety standard. Thus, once the court of appeals identified errors in NHTSA's decision, the court was barred from further "dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 544-545, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). The court instead should have remanded for further proceedings on the effective date issue.

The immediate practical significance of the August 4 order was diminished by the court of appeals' recall of its mandate on November 18, 1982, which had the effect of reinstating NHTSA's rescission of the mandatory passive restraint standard pending review by this Court. However, if this Court were to affirm the court of appeals' holding that NHTSA had not validly rescinded the passive restraint requirement, the effective date issue might be raised again in the court of appeals. For this reason, if the Court affirms the court of appeals' June 1, 1982 judgment and order, it should remand to the court of appeals with instructions to remand the case to NHTSA for further proceedings on the effective date issue as well as on the merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392, provides in pertinent part:

> (a) Establishment
>
> The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.
>
> (b) Applicability of administrative procedure provisions
>
> Subchapter II of chapter 5, and chapter 7, of title 5 shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.
>
> * * * * *
>
> (e) Amendment and revocation of standards
>
> The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.
>
> (f) Factors to be considered in prescribing standards
>
> In prescribing standards under this section, the Secretary shall—
>
> (1) consider relevant, available motor vehicle safety data, including the results of re-

search, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

2. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, provides in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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